

Preferential vote in the Constitution and Unconstitutionality of its application by the Electoral Code in Albania

Fabian Topollari

University of Tirana, Albania

Abstract

The Constitution of the Republic of Albania with the amendments of July 30, 2020 determines the way how the deputies of the Assembly of the Republic of Albania are elected, adding as part of Albania's electoral system the preferential vote. Article 64 of the Constitution sanctions that:

- The Assembly consists of 140 deputies, elected according to a system of proportional elections with regional competition and national threshold;
- The electoral subjects that reach the national threshold participate in the distribution of mandates;
- Voters enjoy the right to give their preferential vote to candidates on multi-name lists. The election law establishes the criteria and rules for implementing the electoral system, the designation of constituencies, the national threshold, the number of mandates for each constituency, the distribution of mandates and the extent of the preferential vote. "The election law guarantees that no less than two-thirds of the multi-name list will be subject to preferential voting and will ensure gender representation."

Due to the special importance of the Institution of the Assembly of the Republic of Albania, the Constitution has defined in the basic act not only the composition of this body, its functions and competencies, but also the way the deputies are elected in the Republic of Albania. By defining the main rules and principles of the selection process by the electors of the deputies of the Assembly of the Republic of Albania, the constitution-maker on the one hand proves the special importance of this body and on the other hand takes care that the composition of the Assembly of the Republic of Albania is an expression of popular will.

Keywords: Preferential vote, Constitution, Electoral Code, Albania.

Introduction

The constitutional provisions of the process of selection of Assembly members' sanctioned by Article 64 of the Constitution and onwards, are closely related to the fundamental right to vote and to be elected, because the Assembly is the highest representative body directly elected by the voters who are also the holders of sovereignty in the Republic of Albania. This means that when the constitution-maker has defined the right to vote and to be elected as a constitutional right in its article 45, firstly has taken into account the possibility of citizens to select the deputies of the Assembly of the Republic and second the opportunity of each voter to compete and to be elected as a member of the Assembly.

Since the amendments of 2008, the Constitution of the Republic of Albania defines the proportional electoral system with multi-name constituencies as an electoral

system applied in the Republic of Albania for the election of deputies according to which electoral subjects competed in constituencies with multi-name lists of candidates for deputies and in each constituency the electoral subjects produced mandates in proportion to the votes they had secured. Even with the changes made to the Constitution by law 115/2020, the regional proportional system was preserved because the competition of electoral subjects is still done with multi-name lists in each electoral region. So according to this system, the Electoral Code divides the country into several constituencies and the electoral subjects are presented to the voters in each region with a multi-name list of candidates for deputies. Voters by voting for the electoral subject have consequently voted for the multi-name list of that subject. Thus, the mandates for deputies in each electoral region are produced based on the number of votes provided by each electoral subject. Even though the electoral system was preserved, the Constitutional amendments adopted by Law 115/2020, have set new rules on determining the winning candidates within the multi-name list of electoral subjects. Previously, the Constitutional provisions of Article 68/1 sanctioned that the order of the multi-name list of electoral subjects could not be changed after its submission to the CEC, and consequently the mandates were distributed according to the order in the multi-name list and the winners were determined those on the top. in proportion to the mandates won, with the amendments to the Constitution made through law 115/2020, the way of determining the winners has changed.

According the constitutional changes implemented by law 115/2020, the ban on not changing the ranking of the multi-name list from Article 68 of the Constitution has been removed, and the voters have the right to, in addition to the electoral subject and consequently the multi-name list they vote for, also vote for their favorite candidate within this list. Article 64/3 of the Constitution sanctions the right of voters to give a preferential vote within the multi-name list, and also guarantees the right of voters to vote and also select the preferential candidate within the multi-name list of the political entity for which the voter has voted.

Consequently, with the changes of July 30, 2020, the constitution-maker on one hand has kept intact the regional proportional system as a legal formula that determines the number of winning seats of each electoral subject in the constituencies and on the other hand has increased the possibility of determining winning candidates within multi-name lists of electoral subjects through preferential vote. Simply put, if previously the Constitution guaranteed voters only the right to vote and select only the preferential electoral subject and the preferential multi-name list, now in addition to the multi-name list, the voter directly selects his preferential candidate within this list. This means that with the constitutional changes of July 30, 2020, Albanian voters have been given the right to vote for the preferential candidate of the multi-name list for which they vote. Previously, the voters had the right to an only vote to determine the deputies of the Assembly of the Republic of Albania, while today, based on the changes that occurred to the Constitution with law 115, dated 30.7.2020, the voters directly select the deputies by exercising two types of votes. The first vote is for the electoral subject and the multi-name list they select, based on which the number of mandates of each electoral subject in each electoral region is determined. While the second vote is for the preferential candidate within the multi-name list, which

determines the distribution of mandates of the winning candidates of each electoral subject.

This means that if previously the Constitutional provisions guaranteed the voters only the right to determine the number of deputies of electoral subjects, with the Constitutional amendments implemented by law 115/2020, voters also select the candidates who will become deputies.

In this way, the preferential vote is the only constitutional legal institute that determines the distribution of mandates among the candidates of the same electoral subject. Such an institute is defined for the first time in the Constitution of the country and thus is added to the constitutional definitions for the electoral system in the Republic of Albania. The purpose of this determination is to improve our electoral system and to establish a more direct link between the electorate and the elected. The previous electoral system where only the electoral subject was voted and the mandates were distributed according to the ordinal number of the candidates on the multi-name list was considered problematic because it favored the governing bodies of political parties and not the voters. This is because the ranking of candidates was the prerogative of political parties. As a purely proportional system, voters in turn had the right to vote only for political parties, and their will was decisive for the number of seats each electoral subject would win, but had no influence on the distribution of seats among candidates. of the political party thus creating a gap between the electorate and the elected.

Preferential voting and the distribution of seats based on this new constitutional institute is a major contribution towards a more direct link between voters and their representatives. Now the voter does not only determine the number of seats that each electoral subject will win but he has the opportunity to directly select through the preferential vote the deputies of the Assembly. In this way, our regional proportional system is corrected with majority elements, as long as the voters directly select their preferential candidate. This improvement is of great importance if we consider that today it is widely accepted that the best electoral systems are those mixed ones. So those systems that manage to combine the advantages of the proportional system with the majority one.

Linking voters to their constituents through preferential voting makes the Assembly election process more representative. If we keep in mind that according to the Constitutional provisions, the sovereignty in the Republic of Albania is held by the people and they exercise it through their elected representatives, the importance of the preferential vote in the direct selection of deputies is understood even more clearly. Representative democracy requires the most direct and close relationship between the people and its representatives. And the preferential vote through which the voters nominate their deputies, is already the most influential institution in our electoral system that directly connects the voters with the deputies of the Assembly of the Republic of Albania.

The Constitutional Reserve defined by point 3 of Article 64 of the Constitution for the extension of the preferential vote to at least 2/3 of the list of the electoral subject aims at the possibility of political parties to guarantee the representation of their party hierarchy in Parliament. As political parties and their political hierarchy are

considered by law to be public institutions and public good without which pluralism and the system of democracy cannot exist, the constitution-maker has given political parties the opportunity to guarantee the representation of their leaders in parliament. It guarantees this possibility through the right left to the electoral subjects that up to 1/3 of their list is not subject to the preferential vote. The measure of extending the preferential vote, at least to 2/3 of it, guarantees at the same time the representation of the leaders of political parties in the Assembly but also does not violate the principle of direct election of deputies by the voters.

This Constitutional amendment not only sets out new rules on how the deputies of the Assembly of the Republic are elected and how the mandates are distributed, but also expands the possibilities of the voters in exercising their right to be elected and to elect as long as they do not elect not only the electoral subject and the multi-name list, but also directly select the candidates within this list through a preferential vote. The right to vote is one of the fundamental constitutional rights and is guaranteed by Article 45 of the Constitution of the Republic. Therefore, the definition in the basic law of the preferential vote exercised by the voters, is already an extension of the fundamental right and the opportunities that this right creates for the citizens with the right to vote in the Republic of Albania. This doubles the voters' right to vote. Because they now do not only elect the electoral subject and the preferential multi-name list in their region, but directly elect the future deputies through preferential voting. This definition is clearly considered an additional opportunity in the fundamental right to vote, which is one of the constitutional rights of the political type in the catalog of rights defined by the Constitution of the Republic of Albania.

Unconstitutionality of the Electoral Code in the application of the preferential vote

Regarding the violation of the principle of equality of the vote guaranteed by Article 45/4 of the Constitution.

In October 2020, the Assembly amended the Electoral Code in order to reflect the Constitutional amendments adopted by Law 115/2020, which also changed the formula for distributing mandates to the winning candidates on the list of electoral subjects. Specifically in article 21 of law no. 118/2020 "On some additions and changes to law no. 10019, dated 29.12.2008, "The Electoral Code of the Republic of Albania", as amended, is sanctioned that:

Article 21

Article 163 is amended as follows:

Article 163

Distribution of mandates to the winning candidates of the list

1. Immediately after the completion of the calculation of the result, according to article 162 of this Code, the CEC calculates the distribution of mandates for the winning candidates for each subject.
2. The distribution of mandates begins in descending order, based on their order in the list submitted according to Article 67 of this Code, starting from ordinal number one,

as well as the number of preferential vote of each candidate based on the following procedures and criteria.

3. In the beginning, the candidates who have received a number of preferential votes greater than the quotient resulting from the division of the number of votes of the subject with the number of mandates won by the subject, according to article 162 of this Code, benefit from the mandate. In any case, the quotient may not be more than 10,000 votes. If the quotient obtained from the division is a decimal number, the nearest whole number is taken as the quotient.

4. The candidates with the highest number of preferential votes than the former, according to point 3 of this article, replace the candidates in the list, who could have won mandates, who have the lowest number of preferential votes.

5. This rule does not apply if the candidate with the fewest votes belongs to the least represented gender. In this case, the replacement passes to the other candidate ranked immediately above with a number of votes until the list is exhausted according to the same criteria. When the candidate with more votes than the quotient belongs to the same gender, the provisions of point 4 of this article are applied.

6. After the exhaustion of the replacement of the candidates according to point 3 and 4 of this article, the distribution of mandates continues with the remaining candidates according to the ordinal number of the list.

7. The remaining candidates of the list, who do not receive mandates according to points 2 to 6 of this article, are re-ranked based on the number of preferential votes starting from the highest number of votes. When the number of votes is equal, the ranking is determined by lot. The reordering according to this point is used in the application of article 164 of this Code.

8. The calculation and distribution of mandates, according to article 162 and this article, for each constituency is approved by decision. The decision is issued for each constituency separately. An administrative appeal can be filed against the decision in KAS".

Article 21 of Law 118/2020 which defines the distribution of mandates for the winning candidates of the multi-name list of the electoral subject, clearly contradicts Articles 45 and 64 of the Constitution and therefore must be declared unconstitutional by this Court.

As we reasoned above, the Constitution with the amendments of law 115/2020 has extended the right to vote in the Republic of Albania which is guaranteed by Article 64 of the Constitution because it has given the voters the right to select in addition to the multi-name list for preferential deputies within this list. Thus, in order to elect the deputies, the voters have the right to exercise two types of votes, the vote for the electoral subject and the vote for the preferential candidate within the multi-name list. With the vote for the electoral subject they determine the number of mandates of each electoral subject in the electoral region, while with the preferential vote they determine the distribution of the mandates of the deputies.

On the other hand, Article 45 of the Constitution, which defines the right to vote, also sanctions the features of the vote in the Republic of Albania. According to this Constitutional definition, it results that:

1. *Every citizen who has reached the age of eighteen, even on election day, has the right to vote and to stand for election.*
2. *Citizens declared by a final court decision as mentally incompetent are excluded from the right to vote.*
3. *Citizens who have been sentenced to imprisonment, with a final decision, for committing a crime, are excluded from the right to be elected, according to the rules determined by law approved by three-fifths of all members of the Assembly. In exceptional and justified cases, the law may provide for restrictions on the right to vote of citizens serving a custodial sentence, or the right to be elected before a final decision is made or when citizens have been expelled for a crime. or for very serious and serious breach of public safety.*
4. *The vote is personal, equal, free and secret."*

If Article 64 et seq. Of the Constitution of the Republic of Albania defines the legal formula of how the votes of the voters determine the division and distribution of the mandates of the deputies, article 45 determines the manner of exercising the right to elect the deputies of the Assembly of the Republic by determining that which entities exercise this right and how the right to vote is exercised.

According to Article 45, equality of the vote is one of the main constitutional features where it is sanctioned that the vote in any case takes value only if it has the same weight between the different entities that exercise it. The Electoral Law in the provisions sanctioned in its article 163 does not guarantee the equality of the preferential vote of the voters. This is because Article 163 of the Electoral Code, when determining the distribution of seats for the winning candidates within the multi-name list, does not respect the constitutional provisions of Articles 45 and 64 because it does not give decisive importance to the distribution of preferential votes provided by candidates. but their ranking in the multi-name list of the electoral subject. The Electoral Code in its Article 163 gives primary importance to the ranking of candidates on the list to determine the winning candidates and not the number of preferential votes provided by the candidates. According to the legal provisions, the distribution of mandates begins in descending order, respecting the ranking of candidates on the list from number one onwards. In order for a candidate to be able to win a mandate outside his / her numerical ranking in the list, he / she must provide a preferential number of votes higher than the quotient calculated as a division of the total number of votes provided by the electoral subject with the number of mandates of that entity.

Given the constitutional principles, the formula sanctioned in Article 163 of the Electoral Code for the distribution of seats among candidates and the application according to this formula of preferential voting is deeply unconstitutional as long as the equality of preferential voting sanctioned by Article 45 of the Constitution is not guaranteed. This is because according to the formula of the electoral law on the distribution of seats, the preference of voters for candidates has no equal value as long as the determinant in the distribution of seats among candidates of the same party is their ranking in the list and not the number of preferential votes they provide. It is true that voters have the right to vote for their preferential candidate on the ballot, but their preference does not apply equally as long as the formula provided in Article 163 of the Electoral Code does not give the mandate to the candidate with the most preferential votes, but to the candidate who is positioned higher in the ranking of the

multi-name list of the electoral subject.

According to the provisions of Article 163 of the Electoral Code, the distribution of mandates of the electoral subject begins in descending order according to the ranking of candidates in the multi-name list. The ranking can be broken and if a candidate ranked in the losing part can take the mandate of a candidate ranked in the winning part of the list only if two conditions are met at the same time. First it is required that the candidate ranked in the losing part has secured more preferential votes than at least one of the candidates ranked in the winning part of the list and at the same time he has secured more preferential votes than the quotient which is calculated as the sum of votes received by the electoral subject by dividing it by the number of mandates produced by that electoral subject in the electoral zone. The requirement of Article 164/3 of the Electoral Code which sanctions as a condition for determining the winners only if the candidate has secured preferential votes more than once produced as a division of the total votes provided by the subject with the number of seats, is a deeply unconstitutional definition because does not respect the principle sanctioned in Article 45/4 of the Constitution which determines the equality of the vote of the citizens in their right to vote. Just as the Electoral Code sanctioned the right of voters to an equal vote when they vote for electoral subjects, it also has an obligation to guarantee the equality of the preferential vote that voters exercise for electoral subject candidates.

Even if we refer to the comparative constitutional jurisprudence, we notice that the Constitutional Court of Italy in its decision no. 1, of 2014, among others on the issue of equality of the vote has stated that:

The constitutional principle of equality of the vote - determined by this Court - requires that the exercise of the active right to vote be exercised on equal terms, as long as "each vote contributes potentially and with equal power to the formation of elected bodies."

In this case, this moment of constitutional importance is violated by the norm subject to trial. This is because the votes for the electoral subject are not calculated equal to the vote for the specific candidate. In other words, the ranking made by the political party has an advantage over the vote given by the voters themselves. At this point we must take into account the fact that according to Article 2, point 1 of the Constitution, sovereignty belongs to the people, who according to point 2 of the same provision exercise it through representatives. Exactly the moment of election of representatives is affected as more votes prevail over the party, than votes against the concrete candidate.

The form that the constitution has defined to exercise the right to vote in the Republic of Albania is the vote. And for this fundamental right to be exercised according to the definitions and constitutional requirements, it must in any case meet the conditions of being self-sufficient, equal, free and secret. The feature of equality of the vote sanctioned in Article 45/4 requires that the vote of each subject of law have equal weight in relation to other subjects. Thus, the preferential vote is required to have the same value among the different voters in determining the winning candidates for deputy. The fact that the electoral code makes it a condition for the breakdown of the ranking to provide a number of preferential votes of the candidate greater than the

total number of votes of the entity divided by the number of seats of that entity and not just the number of preferential votes provided by each candidate multi-name list, constitutes a clear violation of the equality of the vote sanctioned by Article 45/4 of the Constitution. The character of an equal vote requires that the vote of each voter have the same value in determining the candidates to be declared the winner. While the formula of the electoral code for determining the winning candidates does not ensure the equality of the preferential vote as long as it requires the collection of a very large ammount of preferential votes compared to the other candidates on the list as the only way to be declared the winner. According to this formula, practically a candidate even if he secures the multiple of the preferential votes of all other candidates in the list is still not declared a winner if he has not secured preferential votes more than once calculated as the total number of votes provided by the divided electoral subject. with the number of seats. Even in this case, the winners would be announced the candidates ranked higher in the list despite the fact that they may have received together several times less preferential votes than the candidate at the bottom of the list.

Therefore, we can clearly say that Article 163 of the Electoral Code violates the right to vote according to the principles of Article 45 of the Constitution as long as it does not guarantee the equality of the preferential vote for the candidates for deputies.

The equality of the preferential vote should be ensured not only when they go to the candidates of the same electoral subject, but also in the case when they are cast for candidates running with different subjects within the same constituency. The characteristic of equal voting that is sanctioned by Article 45 of the Constitution is a right related to the voters who exercise it and requires that the weight of the vote of each voter have the same value even in cases when this vote has gone to candidates of subjects. various electoral.

The formula for the distribution of mandates provided by Article 163 of the Electoral Code, connects the possibility that the preferential vote affects the distribution of mandates with the amount of preferential vote provided by the candidate in relation to the mandates produced by the electoral subject under which he competes. This number of preferential votes is called "quotient" in the sense of Article 163 of the Electoral Code. Since the quotient is calculated in each case for each candidate in proportion to the number of seats provided by the electoral subject under the logo of which he has competed, the number of preferential votes to be collected for the candidate in order for him to receive the seat is different. for candidates of different electoral subjects because the quotient is different. Which means in other words that the preferential vote of the voters has a different impact depending on the electoral subject for which it is cast. In this case the preferential vote has a higher value when it is cast for an electoral subject that produces more seats in the constituency and a lower value when it is cast for a subject that produces fewer seats within the same constituency. This is due to the fact that it is different in each case and that is related to the number of mandates provided by the electoral subjects and not to the number of preferential votes that went to the candidates. As we reasoned above in this request, Article 45 of the Constitution sanctions the right of voters to have their vote equal in every case and to have the same value among the different voters who exercise it.

Thus, the preferential vote that must be characterized in each case by being equal and with the same weight is not guaranteed by Article 163 of the Electoral Code when it is cast for candidates of different electoral subjects as long as it has the same value and depends on each case from the number of mandates provided by the electoral subject. The equality of the preferential vote should be ensured not only when they go to the candidates of the same electoral subject, but also in the case when they are cast for candidates running with different subjects within the same constituency. The characteristic of equal voting that is sanctioned by Article 45 of the Constitution is a right related to the voters who exercise it and requires that the weight of the vote of each voter have the same value even in cases when this vote has gone to candidates of various electoral subjects.

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formula for the distribution of seats within the multi-name list provided by Article 163 of the Electoral Code does not give any value either theoretically or practically to the preferential vote when it is for candidates of entities that produce only 1 deputy seat in the constituency.

For all the stated reasons it is very clear that the provisions of Article 163 of the Electoral Code do not consider a fundamental right provided by the Constitution of the Republic of Albania which is the right of voters to exercise the preferential voting result to select in addition to the political entity even their favorite candidates within the multi-name list.

Regarding the violation of the Constitutional right to vote

In this case, Article 163 of the Electoral Code is not only in clear violation of the constitutional right of voters to vote, which derives from Articles 45 and 64 of the Constitution because it does not respect the equality of the preferential vote but also constitutes an unjustified restriction of this constitutional right. This is because the Constitution determines the possibility of the legislator for the restriction of fundamental constitutional freedoms and rights, but in any case this restriction must be realized in accordance with Article 17 of the Constitution which stipulates:

1. Restrictions on the rights and freedom provided for in this Constitution may be imposed only by law for a public interest or for the protection of the rights of others. The restriction must be in proportion to the situation which has dictated it.
2. These restrictions may not infringe upon the essence of the freedoms and rights and in no case may they exceed the restrictions laid down in the European Convention on Human Rights. "

The question is, is the restriction of the right of voters to vote by preferential ballot a restriction made in accordance with the provisions of Article 17 thereof? Article 163 of the Electoral Code, which was amended by the Assembly of the Republic with law 118/2020, clearly constitutes a restriction in exceeding the cases defined in the constitution as long as it neither fulfills the public interest nor protects any other right. Because the restriction by legal provision of the right of voters to determine through preferential voting the winning candidates, giving in this process a determining role to their ranking by the electoral subject, neither guarantees any public interest nor any right for any subject other of law.

As for the public interest that would have to be met to justify the restriction of the fundamental right, it is supposed to be an act, action, or rule, the implementation of which would realize a general interest of the citizens and the public. In this case, the opposite happens, because the restriction of the possibility of voters to determine the winning candidates through the preferential vote, favors the public and its selection by favoring only the will of the electoral subject which according to the Electoral Code has the right to determine the ranking of multi-name list. The Electoral Code stipulates that the right to rank candidates in the multi-name list belongs to the party or coalition parties that make up the electoral subject. While the right to submit this list for registration in the Central Election Commission has the Chairman of the Party or the Coalition of parties that jointly run in the elections as an electoral subject.

Therefore, it is clear that between the possibility for the winning candidates for deputy to be determined by the electoral bodies based on the number of preferential votes that the candidates have received from the voters and the limitation of this possibility by the election law passing it to the parties and their chairmen, decide the ranking of the multi-name list, the public interest in any case would be met only if the electorate would determine the winners by preferential vote.

The interests met when the distribution of seats is done directly by the voters through preferential voting, are in any case wider than any other legal institution that excludes the will of the electorate in the distribution of seats and the determination of the winning candidates. This is because in any case the electoral body is the most direct representative of the public and its interests as long as it consists of persons with full capacity to act in the Republic of Albania.

As it is understood, the restriction on the right to vote by Article 163 of the Electoral Code, on the one hand limits the possibility of voters to determine the winning candidates and on the other hand exceeds this possibility to electoral subjects when defining the ranking as a very element important in the distribution of seats, thus favoring the discretion of the parties that have the right to compile the ranking of candidates on the list. And the questions that arise in this case are two. First, if the right of parties to list candidates for deputy in the multi-name list, is it a right that justifies the restriction of the fundamental right to vote? And second, if the right of voters to exercise the fundamental right to a pre-emptive vote can be exercised simultaneously and without prejudice to the right of parties to compile the ranking of candidates on the multi-name list?

When the Electoral Code determines the need for a ranking of candidates in the multi-name list by electoral subjects according to its article 67/4, and for the submission of this list to the CEC by the Party Chairman, it makes these determinations only for bureaucratic registration needs. of the candidates and the technical implementation of the voting process. Article 67 of the Electoral Code, which defines the right of the party to list the candidates in the multi-name list, is located in its chapter 4, entitled "Registration of Electoral Subjects". This chapter defines the procedures and rights and obligations of electoral subjects regarding their registration and their candidates in elections and not the distribution of mandates. So these legal regulations do not aim to create any special right for the parties or their chairmen in determining the winning deputies among the candidates of the multi-name list of deputies, but only in the process of registration of candidates in the elections. Therefore, we can say with conviction that the right of the parties to rank the candidates is not a right that implies the distribution of mandates and the determination of the winning candidates. The right of the Party and its chairman is sufficient only in the fact that the party and the chairman have the opportunity to compile and select the list of its candidates. While their right to compile the ranking is a necessary legal definition only in terms of registration of candidates and organization of the voting process of candidates for deputy from a technical point of view. This is because Voters could not technically exercise their preferential vote for candidates on the ballot if the candidates are not ranked in a numerical order.

This is the reason why many political parties a few months before the elections have

publicly stated that the ranking of their candidates in the multi-name list will be decided by lot among the candidates selected by them in each district.

If the ranking of candidates would have value in determining the distribution of mandates, then the constitution-maker did not have to change with law 115/2020 the definition of Article 68 of the Constitution that gave constitutional legal value to the ranking in the list regarding the distribution of mandates. For all these reasons we can say with conviction that the right of the parties to rank the candidates can be exercised in any case without it being necessary to limit the possibility of the voters to select the winning candidates through the preferential vote.

This is because the right to nominate candidates by the party is a right that is not intended to create discretion for the party in the manner of distribution of seats, at least for 2/3 of its list. Therefore, the restriction created by Article 163 of the Electoral Code for the right to equally exercise the preferential vote, at least for 2/3 of the candidates on the multi-name list, is a restriction beyond the provisions of Article 17 of the Constitution because this restriction neither does it fulfill any public interest, nor does it guarantee any right of any other subject of law, nor does it impede the right of political parties to compile the ranking of their list of candidates for deputies.

Constitutional Reserve and equality of citizens before the law

As provided by Article 64/3 of the Constitution, the legislator really has the right to determine the extent of the preferential vote, but in any case the election law must guarantee that no less than 2/3 of the multi-name list of candidates for deputies. In this case we are faced with a legal reservation when it is provided that the law on elections determines the extent of the preference vote and then in the same constitutional article, we are faced with a constitutional reservation when it is determined that the measure of preferential voting will have to be subject to at least 2/3 of the multi-name list. In other words, the constitution-maker has left it to the legislature to determine other legal institutes in the distribution of mandates and the determination of the winning candidates, other than the preferential vote, for only 1/3 of the multi-name list of candidates and no more. While according to article 163 of the electoral code, the distribution of mandates is done according to the ordinal number held by the candidates in the multi-name list in relation to the number of mandates won by the electoral subject and this formula applies to the entire list of candidates and not only 1/3 her. So if we refer to Article 163 of the Electoral Code, the ranking in the list has the same determining influence on the distribution of seats for all candidates on the multi-name list and not only for 1/3 of them.

The legal reserve is the possibility of the legislator to make the restriction of the Constitutional rights only in the cases and the measure defined in the Constitution. Even in this case, we are really facing a legal reservation when the Constitution stipulates that the extent of preferential voting will be determined by the election law. But in the same Constitutional article we also have a clear Constitutional reserve when it is determined that this restriction measure can never extend more than 1/3 of the multi-name list. In other words, through the legal reserve of Article 64 of the Constitution, the legislator has recognized to the legislator the possibility

of determining other institutions in the distribution of mandates, other than the preferential vote, only as much as 1/3 of the list. This is because in the same article, we have a clear constitutional reserve when it is determined that no less than 2/3 of the multi-name list of candidates will be subject to preferential voting. If the legal reserve is the legislator's ability to limit constitutional rights by law, the constitutional reserve is the legislator's inability to limit these rights beyond the provisions of the Constitutional reserve. Therefore, in this case as well, the fact that Article 163 of the Electoral Code gives the same importance in the distribution of mandates to the ranking of candidates for MPs in the entire multi-name list and not only in 1/3 of it, constitutes a clear violation of the Constitutional reserve sanctioned in Article 64/3 thereof. This is also because the Constitutional reserve of Article 64 guarantees at least that 2/3 of the candidates on the multi-name list will be subject to preferential voting. And the consequence among the candidates of this part of the multi-name list of candidates the distribution of seats will be done based only on the number of preferential votes they have secured.

While the legislator did not take into account the Constitutional reserve in this case when he extended the same importance that he gives in the process of allocating seats to the ranking of candidates throughout the multi-name list, and not only in 1/3 of it, he violated also the principle of equality of citizens before the law. In its Article 18 the Constitution sanctions one of the main principles when it stipulates that:

1. All citizens are equal before the law.
2. No one may be unjustly discriminated against on the grounds of sex, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic status, education, social status or parental affiliation.
3. No one shall be discriminated against for the reasons referred to in paragraph 2 unless there is a reasonable and objective justification.

This article of the Constitution guarantees us the equality of citizens before the law, while its article 64 guarantees the right of at least 2/3 of the candidates on multi-name lists to be subject to preferential voting. Which means that the Electoral Code should guarantee at least the equality of 2/3 of the multi-name list candidates before the law in the distribution of seats among them.

This is not guaranteed by Article 163 of the Electoral Code as long as it gives equal importance in the distribution of mandates to the ranking of candidates on the list starting from the first ranked and up to the candidate ranked at the bottom of the multi-name list. By giving the ranking in the list the same value for all its candidates, practically Article 163 of the Electoral Code has violated the principle of equality of citizens before the law, at least for 2/3 of the candidates on the multi-name list. Because in the conditions that the Constitution in its article 64 guarantees that at least 2/3 of the multi-name list is subject to preferential voting, the legal formula for the distribution of mandates should not give any importance to the ranking of candidates in the list at least for 2/3 of it. In order to ensure the equality of citizens before the law, in this case the legislator was required not to create any additional favoritism due to the ranking in the distribution of seats, at least for 2/3 of the candidates on the multi-name list. Which means that if the legislator has the right to create additional favors related to the ranking only for 1/3 of the candidates, he is obliged for the rest of

them to guarantee equality before the law and for this part to make the distribution of seats only based on the number of preferential votes and not their ranking in the list. The principle of equality before the law is one of the main constitutional principles. According to this constitutional principle, the legislator is required by law to treat equally persons who are in more or less equal conditions between them. In the case of 2/3 of the candidates on the multi-name list, they are clearly on equal terms with each other and despite this are not treated equally in the process of distributing mandates according to the provisions of Article 163 of the Electoral Code. This is because the law in this case would unfairly favor those who are ranked higher in the multi-name list and would disadvantage due to the ranking the candidates with more preferential votes.

Thus, the legislator with Article 163 of the Electoral Code not only extended his powers in violation of the constitutional reserve by giving the ranking of candidates equal importance throughout the list but consequently violated the constitutional principle of equality of citizens before the law sanctioned by Article 18 Of the Constitution for at least 2/3 of the candidates on the multi-name list. This is because according to Article 163 of the Electoral Code, even between two candidates who are listed below 1/3 of the multi-name list, the law gives the mandate to the candidate listed above, favoring him only because of the ranking and not the candidate who has secured more preferential votes. Despite the fact that these two candidates enjoy equal rights under Articles 64 and 18 of the constitution because both are in part 2/3 of the multi-name list, the provision of the electoral code in an unconstitutional way creates in this case an illegal favoring in favor of the candidate who is ranked higher in the list and an illegal discrimination for the candidate who and why has secured more preferential votes again can not be declared the winner and take the mandate of deputy because of his ranking.

Equality of citizens according to the provisions of Article 18 of the Constitution requires that the law guarantees equal rights for citizens who are on equal terms. Just like the Albanian Constitution, every Constitution guarantees the fundamental right to equality before the law. Equality requires that in case a difference between persons is not significant, unequal treatment should be avoided. The Equality Dimension aims that as long as there is no substantial difference between persons, they should be treated equally. In flagrant contradiction with this constitutional principle, Article 163 of the Electoral Code denies the mandate to a candidate who and why enjoys the same legal status as other candidates and has secured more preferential votes than them, just because of his ranking in multi-name list of candidates. So the law does not openly treat candidates in the same way when it comes to the distribution of seats even though they enjoy the same status among themselves, that of the candidate of the electoral subject.

Regarding the violation of the principle of hierarchy of norms

The formula for determining the winning candidates according to Article 163 of the Electoral Code gives a dominant and decisive role to the ranking of candidates on the list in relation to the number of preferential votes they have secured. This institute

is defined in article 163 of the Electoral Code according to which the mandates are distributed according to their order and this order can be broken only if one or some of the candidates manages to secure preferential votes more than the votes of the electoral subject divided by the number of mandates that have produced those votes, is a profoundly unconstitutional institution. This is because it gives decisive and dominant value in the announcement of winners to the ranking of candidates in the multi-name list and not to the preferential vote they have secured. This definition contradicts both the spirit and the letter of the Constitution. This is because the ranking of candidates in the list proposed by the electoral subject is not a constitutional definition, while the preferential vote is guaranteed by Articles 45 and 64 of the Constitution.

The principle of supremacy of the Constitution is guaranteed by its article 116 which stipulates that the Constitution stands at the head of all sources of law in the Republic of Albania. This principle is evoked and elaborated in the constitutional jurisprudence for the first time in the decision no. 29, dated 09.11.2005, which states that:

The normative understanding is based on the legal hierarchy and the supremacy of the Constitutional norm over the lower acts, which in constitutional doctrine is known as the principle of supremacy and supremacy of the Constitution which obliges all public authorities to exercise their powers only in framework and based on the Constitutional norm ". The court has formulated in such terms this principle "what the Constitution did not want to do, the law cannot do".

The Constitution of the Republic of Albania defines the proportional system with regional competition as the system of election of deputies in the Republic of Albania. And it does not define in any of its provisions the ranking of candidates as an element that will have value in the way the elections for the Assembly of the Republic of Albania are organized, much less in the way in which the mandates will be distributed. Even for this reason, with the Constitutional changes made through law 115/2020, Article 68 of the Constitution was amended, which determined the immutability of the ranking of candidates in the multi-name list after it was submitted. Currently, Article 68 of the Constitution only defines the right of the Legislator to determine the rules for the registration of candidates and the rules for the organization of elections in Albania. These rules in any case must be in accordance with the Constitution of the Republic as a normative act that stands at the top of the hierarchy of sources of law in the Republic of Albania. It is true that the Constitution has left the legislator the possibility to determine the measure of the extent of preferential voting, but in any case this measure can not be less than 2/3 of the list of candidates for MPs. Which means that the legislator has the opportunity to determine other legal institutes that influence the distribution of mandates, other than the preferential vote, only for 1/3 of the candidates on the multi-name list. As for 2/3 of the list, the Constitution in its article 64 onwards has defined only the preferential voting as the only institution that will be applied for the distribution of mandates and the determination of the winning candidates.

Conclusions

The Law on Elections, based on Article 68 of the Constitution, will have to determine

the rules for organizing elections and registering candidates for deputies, but in no case can these rules go beyond the constitutional spirit and letter. In this context, the reasoning of the Electoral Code can determine the need to rank candidates for deputy in the multi-name list for technical reasons of conducting the preferential voting process for candidates of the electoral subject, but it can never give this ranking a defining value in the distribution of seats, at least in terms of 2/3 of the candidates for deputies. This ranking can have only bureaucratic and technical value as long as the candidates must have a number within their subject in order to technically conduct the preferential voting, but by no means can this ranking have a determining value in announcing the winners. Because the Constitution has defined only the preferential vote as the only legal instrument for determining the candidates participating in the distribution of mandates and according to Article 64 of the Constitution the preferential vote will have to be subject to at least 2/3 of the multi-name list.

Even more problematic from the Constitutional point of view becomes the content of Article 163 of the Electoral Code which provides for the distribution of list mandates, if we consider that the preferential vote for candidates has a much lower practical impact on determining the winners in relation to their ranking throughout the multi-name list. And this happens in the conditions that the preferential vote is a constitutional institute that derives from the fundamental constitutional right to elect the highest representative body in the Republic of Albania, while the ranking of candidates in the list is a purely legal determination that as we explained above is done only for technical purposes of registering candidates and conducting preferential voting. The Electoral Code in its article 163 requiring a very high number of preferential votes for each candidate as the only way that he can secure the mandate despite the ordinal number he has in the multi-name list, gives the ranking a much greater value and much disproportionate compared to the preferential vote secured by the candidates. So disproportionate is the importance of the preferential vote that the candidates have secured compared to their ranking in the list, that in the electoral regions where electoral subjects provide only one parliamentary mandate, and theoretically this mandate will be taken in each case by the first ranked candidate in the list however the preferential votes are distributed to the candidates of that electoral subject. In this case the preferential vote has no bearing on the manner in which the seats are distributed. Referring to the recent parliamentary elections, 12 deputies were elected from entities that have secured only one seat in the constituency.

References

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